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March 15, 1999

By Fax (303-321-3385);
Original by Express Delivery

David S. Guzy, Chief
Rules and Publications Staff
Minerals Management Service
Building 85, Room A-613
Denver Federal Center
Denver, Colorado 80225

Re: Proposed Rule,
Appeals of MMS Orders, 64
Fed. Reg. 1930

Dear Mr. Guzy:

On behalf of the California State Controller's Office (SCO), the following comments are submitted to the proposed rules for appeals of royalty orders of the Minerals Management Service (MMS).

At the outset, SCO notes that the current proposal reflects some important improvements to the process recommended by the Royalty Policy Committee (RPC) and the previous regulatory drafts that were aimed at accommodating the RPC's views. SCO is particularly supportive of MMS's clarification of its penalty regulations.

SCO still has serious concerns about the overall direction of MMS's proposal and its reduction in opportunities for active State participation in an appeals process. SCO addresses those two main points below. SCO also has attached a document providing section-by-section comments to specific MMS proposals. Attachment 1.

Proposed One Stage Appeals Process

SCO continues to believe that the overly bureaucratic and highly regulated approach represented by the MMS's current proposal is not conducive to the time restraints placed on the Department of Interior under the Royalty Fairness and Simplification Act (RFSA). Many of the facts referred to in the preamble to the proposed rule simply confirm that SCO's concerns are factually justified. 64 Fed. Reg. at 1931

As MMS knows, SCO has previously submitted comments detailing why the RPC's proposal to increase procedural formalities and direct appeals to the Interior Board of Land Appeals (IBLA) is not legally required; is not cost effective for any interested person, and is not administratively efficient or feasible. Letter of March 14, 1997 to Bettine Montgomery, OPM/MMS (enclosed as Attachment 2 and incorporated herein). SCO continues to support appeals to the MMS Director, who should be delegated the responsibility to issue final decisions for the Department. Any further Departmental review by IBLA or the Secretary should be wholly discretionary, like certiorari to the Supreme Court. SCO believes that such a process will assure that royalty appeals are addressed by those within the Department with the necessary expertise and will promote expedited resolution of appeals, which was one of the stated goals of the RPC.

The second goal of the RPC was to increase the likelihood of "independent" decision-making. 64 Fed. Reg. at 1930. As SCO pointed out in its previous comments, while it both acknowledges and is sympathetic to the RPC's expressed concerns (id.), nothing in MMS's current appeals process runs afoul of any legally mandated "independence" requirement or of administrative due process requirements.

Moreover, most of the RPC's concerns -- uncertainty about record content and influence on appeals of MMS investigatory staff -- would be more easily and expeditiously resolved if industry were required to state its objections and submit proof in support at the issue letter stage. Such an approach would enhance the audit process; reduce the costs and disruptions caused by the diversion of audit resources to appeals support, and narrow at the earliest possible stage the number of appealable issues. In SCO's view, it is not unfair to require industry to refocus their own internal review processes at an earlier stage in the audit process, especially one that is designed to give industry an opportunity to respond. It is however unfair to require the federal, State and Tribal governments to rework their audits in order to address issues and facts provided to them for the first time after appeal. The need for reworking issues and facts, fostered under the RPC proposal, actually requires more interaction between the Director and investigatory staff.

RPC's concerns about the secret influence of the Solicitor's Office on MMS decision-making can also be addressed through less drastic avenues. See Attachment 2 at p. 12. In fact, whether it is involved as the relevant audit entity or as an appellant, SCO also would want to be notified about any new policy or legal assertions of the Solicitor's Office and would want an opportunity to provide its separate views, if any, to the Director.

SCO notes that nothing in MMS's proposal protects against RPC's concerns about "independence." Nothing prohibits the MMS Director from informally discussing its position regarding an order with investigatory staff; in fact, the MMS Director is explicitly authorized to make such contacts. See e.g., Proposed § 4.929. Nothing prohibits or limits the MMS Director from seeking the input of the Solicitor's Office; this is left wholly unregulated under the current proposal. Moreover, nothing prohibits the MMS Director from expanding on the policies or legal arguments in support of his/her concurrence with, modification of or rescission of an order; nothing should. Given the history, it is highly doubtful that IBLA would refuse to extend some degree of deference to MMS's expertise, whether the Service's views are set forth in a formal decision in an appeals format or through a more informal "letter decision" from the Director.

SCO's recommended approach provides greater protection to non-federal interests in "independence" than either the MMS's current proposal or its RPC predecessor.

State Participation

Serious questions exist as to whether MMS's limitations on State participation in the appeals process are lawful. SCO has at least three separate concerns in this regard.

(1) SCO opposes MMS's refusal to allow any delegated State the opportunity to appeal the Service's refusal to issue an order arising from a State conducted audit. As MMS is well aware, SCO has initiated such an appeal in the past; its appeal was processed as a normal appeal, and no issue was ever raised by the Department that SCO did not have the right to appeal. See Office of the State Controller, MMS-92-0278-O&G(January 15,1993). MMS's rationale for placing this new limitation on a State's administrative due process rights does not withstand analysis.

First, MMS states that this restriction is justified by the fact that States do not have any independent interest in the property covered under a federal lease. MMS does not, however, cite any authority or provide any explanation as to why a land or lease "property" interest is relevant under any federal leasing law or the Administrative Procedure Act. The distinction MMS attempts to draw is particularly arbitrary given that both Congress and the courts have recognized that States have standing to enforce their monetary interests under the federal leasing laws. *See e.g., Arkla Exploration Co. v. Watt*, 562 F.Supp. 466 (W.D. Ark. 1983), *affirmed*, 734 F.2d 347 (8th Cir. 1984), *cert. denied sub nom, Texas Oil & Gas Corp. v. Arkla Exploration Co.*, 469 U.S. 1158 (1985); 30 U.S.C. § 1734. In fact, the Department must give a State a reasoned explanation for its refusal to act on a royalty problem brought to its attention and these regulations should be modified to provide the vehicle for providing guidance to States on how to obtain such a determination.

Second, MMS states that under RFSA States may seek authority to issue the orders themselves; thus, it reasons, States who do not seek this authority have no right to object when MMS refuses to process a recommended order. Absolutely nothing in RFSA, however, remotely suggests that Congress, by granting States greater options for participation beyond audit, intended to truncate recognized rights under pre-existing authority. No logic or law supports the notion that MMS should have two essentially unreviewable opportunities to overturn a State's audit findings simply because the State opted to only assume the audit function.

(2) SCO also opposes MMS's restrictions on a State's opportunity to intervene in a royalty appeal. Traditional and accepted understanding of "intervention" would serve to expand States' rights to intervene in cases involving leases in their jurisdictions and cases otherwise impacting royalties owed in their jurisdictions. See Fed. R. Civ. Proc. 24. Yet, MMS proposes to both restrict a State's right to intervene *and* restrict its very rights on appeal of an adverse letter decision of the Director modifying or rescinding a State audit finding. MMS achieves this through an indefensible interpretation of the word "appellant", as used in RFSA, 30 U.S.C. § 1724(h).

Throughout RFSA, Congress demonstrated its capability of using the words "lessee" or "designee" when it was addressing issues directed at such persons, and using the words "concerned" or "delegated" State when it was addressing issues directed at States. However, in § 115(h)(2) of RFSA, 30 U.S.C. § 1724(h)(2), Congress referred broadly to "appellants." Normal principles of statutory construction require the assumption that if Congress wanted to restrict that term, it would have used its own narrower identifications of the benefitted parties.

An intervenor is a party to a case, with all the rights and obligations of the original parties. Accordingly, depending on the redress sought through intervention, an intervenor becomes a full "plaintiff," "defendant," "appellant" or "appellee" to a case. This is hornbook law, which Congress is presumed to know. Obviously, a State is not adversely affected, at least with regard to appeals of its own audit findings, until the MMS Director attempts to modify or rescind those findings. At that point, upon intervention, the State would become an appellant. A State would also be deemed "adversely affected" if an administrative order was not being pursued or defended on grounds that protect the State's own royalty interests; upon intervention, the State would become an appellant or an appellee depending on whether it was supporting or opposing the appealed order. See Fed. R. Civ. Proc. 24.

While it is true that Congress was reacting to many of the complaints lodged with it by industry in legislating with regard to MMS appeals in RFSA; it is also true the Congress in RFSA intended to enhance and protect the rights of the States. Indeed, given the co-equal role that Congress extended all concerned States as to royalty settlements (see discussion below), it should be assumed that Congress understood that States would be automatic parties to MMS appeals. In short, there is nothing in RFSA or traditional notions of intervention that support MMS's proposal.

(3) SCO opposes MMS's proposed limitations on State participation in the settlement process. As MMS is aware, Congress under § 115(i) of RFSA, 30 U.S.C. §1724(i), gave the Secretary and the States co-equal authority to "compromise and settle a disputed obligation." Yet, MMS proposes to provide to the States only the courtesy of consultation, which itself is limited and which is then used by MMS to reduce a State's notice and due process rights. See e.g., §§4.925; 4.929. MMS's proposal does not comport with the plain language of RFSA; nor is it supported by any legislative history. MMS has failed to put forth any rational explanation for ignoring the plain dictates of RFSA. See e.g., Attachment 3.

As noted above, SCO has attached comments on a section-by-section basis. The attachment does not repeat the comments made above. Nor should the attached comments be construed as any indication of support for the one stage appeals process, as proposed by MMS. Rather, the attached comments are offered to assist MMS in reducing the opportunities for gamesmanship inherent in a more formal procedural approach and to promote expedition, should MMS eventually decide to adopt a one stage appeal to IBLA.

SCO appreciates MMS's and OHA's consideration of its views.

Respectfully,

Lee Ellen Helfrich
Counsel to the
California State Controller's Office

Attachments (3)

ATTACHMENT 1
CALIFORNIA STATE CONTROLLER'S OFFICE
SECTION-BY SECTION-COMMENTS

§4.903-Monetary Obligation

The definition invites disputes over whether a particular obligation stems from "one issue" or "type of underpayment," and does not recognize that a particular underpayment may be attributable to overlapping regulatory violations. It would be more efficient administratively if an appeal of any order to pay looked to the single, total amount demanded or estimated.

§4.903-Nonmonetary Obligation

While SCO agrees that the only relevant Nonmonetary Obligation under RFSA stems from the government's option to take royalty in kind, SCO disagrees with MMS's stated rationale. The only time this obligation arises is after the government has exercised its lease option to take royalty in kind. Prior to exercise of the option, no federal lessee has any right to force the government to take in kind. However, if MMS exercised the option but did not take the oil during the operational period of the option, a lessee might have grounds for appeal.

§4.907

(a) As noted, SCO believes that any delegated State should be able to appeal MMS's refusal to issue an order. Consistent with that position, States should also be exempt from the processing fee.

(b) SCO believes that any "preliminary statement" of issues must be sufficiently detailed and exhaustive to permit MMS, the States and Tribes to fully understand the lessee/designee's position and the legal and factual basis for that position. Thus, the rule should specify that the lessee/designee is required to: (i) cite to controlling precedent and all the precedent, rules, statutes and/or policies upon which its appeal primarily relies; (ii) include any alleged computational errors and how such errors were determined and calculated; and (iii) an inventory list of all exhibits that allegedly support any factual disagreements, along with a written explanation of how they support the lessee/designee's position.

(c) Another condition should be met before an appeal is deemed commenced: adequate bond or a determination of financial solvency.

(d) MMS should require lessee/designee's to file a "certificate of service" as a means of tracking whether a lessee/designee has met all service requirements. An appeal should not be deemed to have commenced until it is clear that the lessee/designee has notified all relevant persons.

§4.914

(a) The resources of the Department, the States and the Tribes should not have to be expended on clearly frivolous or non-meritorious appeals (e.g., statute of limitations, tax reimbursements). Thus, in addition to dismissal for failure to timely appeal, MMS should be granted authority to summarily dismiss clearly non-meritorious appeals. The only reason that a lessee/designee would file such an appeal is to force a settlement, i.e., to attempt to reduce the amount the lessee/designee legitimately owes. Settlement, of course, becomes more viable to the government when it is forced to expend resources on record development, etc.

(b) MMS decisions on timeliness and non-meritorious appeals should be final for the Department.

§4.916

(a) It is illogical to provide that a delegated State's participation is "optional" when the appeal involves a State's audit finding. The State will be involved in record development whether it can participate at any meeting or not. Given the consequences that MMS attaches to failure to show up at a record development conference (consequences that SCO opposes), MMS should permit the States to participate through phone, video conference or through written record designations. The States should also have some say on when and where the record development conference occurs.

(b) The usual consequence in courts for failure to participate in mandatory pretrial processes is that the facts and documents of the participating parties are deemed admissions against the offending party. Given that MMS is providing lessee/designee's many opportunities to supplement the record or extend time, its proposal at §4.916(d) is a hollow incentive.

§4.918

(a) Its called stipulation of facts, not an agreement. A party can stipulate to a fact that it disagrees with when it is a fact that is not material to its claims. One definition of plain language is use of correct and commonly understood terminology.

(b) The lessee/designee should be required to do more that "identify" all relevant documents and evidence. To promote settlement, to protect the government's own appeals interests, and to develop a record, the lessee/designee must be required to produce the documents it will rely on. Again, if the process is to be formalized and highly regulated, MMS must assure that its terminology and requirements are set out with exactitude.

§§4.919, 4.920

(a) In many courts, if not all, the requirement most analogous to MMS's proposed "Joint Statement of Facts and Issues" is exhaustive in that it will contain, at the very least: (1)

stipulations of law and fact, (2) remaining disagreements of fact from all parties' perspectives and the evidence supporting each perspective; (3) summaries of disputed legal positions, with citation to major authorities; and (4) an inventory list of the evidence or items in the record. E.g. Fed. R. Civ. Proc. 16; D.C Sup. Ct. Civ. Proc. R. 16. Following such an approach would better promote expedition than the "two filing" approach proposed by MMS. The only persons that should be entitled to supplement the record with additional evidence are intervenors, since under MMS's proposal the right to intervene comes after record development and after the MMS Director has had the opportunity to modify or rescind.

(b) MMS's proposed record certification procedures have no teeth. The only consequence of failing to certify that the record is complete is that the record remains open; this oddly provides lessee/designee's an incentive not to file a certification. Thus, in order to make this meaningful, MMS should establish a date certain by which a certification must be received or a request to amend the "record" is lodged. [This should replace the opportunities later provided by MMS to allow enlargement of the record]. If neither is filed, the lessee/designee should be prohibited from introducing further evidence or issues; late arising factual disputes should be deemed resolved in favor of the government. Or, if there is a total failure to participate, the appeal should be dismissed. E.g. Fed. R. Civ. Proc. 16(f);D.C. Sup. Ct. Civ. Proc. R. 16-II. Such an approach is consistent with the fact that the burden is on the lessee to show legal or factual error.

(c) The documentary requirements should be tightened. For example, the phrase "indirectly considered in issuing the order..." could be interpreted to require the government to add to the record any documents that it looked at during an audit to, for example, determine gas value. The government should only be required to produce the documentation that supports its order. Similar problems exists with the phrase "evidence ... that bears upon the disputed facts or issues."

(d) Lessee/designee's should be required to segregate those documents that it actually relied upon in making royalty payments, and those that they are using as after the fact justification of their royalty payment. Such information is relevant to both the merits of an appeal, requests to add to the record, and penalties.

§4.923

(a) As noted previously, it is SCO's position that lessee/designee's should not be permitted to add to the record once record development has closed. The opportunity for later supplementation is particularly unwarranted given that MMS also proposes to allow lessee/designee to seek extensions of time for purposes of record development. Both the government and lessee/designee's should be required to act expeditiously.

(b) If a third bite at the document record apple is to remain, MMS needs to add teeth to the showing that a lessee/designee must make to file additional evidence. In the courts, such a party must not merely show that the data was unavailable, but also that it could not have been

accessed through diligent efforts. For example, lessee/designees should not be permitted to say that documents were in the possession of a joint venture, since typically joint venturers or other partners are entitled to access information of the joint venture/partnership. Moreover, the courts also require parties to demonstrate that manifest injustice would result if the evidence sought to be admitted were excluded. See e.g., Fed. R. Civ. Proc. 16(e); D.C. Sup. Ct. Civ. Proc. R. 16(g).

(c) No opportunity is provided in this proposed rule for the government or any other party to contest a lessee/designee's request to add information. Due process is a two way street, and opposing parties should be able to assert unfair surprise, especially since new information adds to their burden and could impact their positions.

(d) To the extent MMS will allow further amendment of the record, the lessee/designee should be required to do so by the time it files its Statement of Reasons at the very latest (but see comments to §4.919 for preferable approach). Allowing lessee/designee's to file additional documentation at the reply stage, as proposed, is inherently unfair to the government and other parties. It promotes unfair gamesmanship. The timing of any action on a request to amend and the timing of an opposing party's response is also inconsistent with the timing imposed for replies and sur-replies under proposed §4.944.

(e) If IBLA does not act on a request to add to the record, then the request should be deemed denied, not granted as proposed. This both reduces the burden on IBLA; is more consistent with the lessee/designee's appeal burden, and reflects a policy, consistent with that of the courts, that late modifications of the record should only be permitted in extraordinary circumstances.

(f) If IBLA does grant a motion to add to the record, the opposing parties should be able to add to the record in their response to the additions. Fifteen days to respond to new evidence is simply not sufficient, when such evidence may introduce new factual disputes and legal issues.

(g) SCO notes that this proposed rule is an example of the inconsistent service requirements set out throughout the rule. Under this rule, a lessee/designee is only required to serve "parties." In other rules, the lessee/designee is required to serve those identified in §4.962. The requirements on who MMS must provide notice also vary throughout the rule. This is extremely confusing. Service of all documents by all parties should be on those listed in §4.962 and those that may become involved at a later point through intervention or an amicus filing.

§§4.924 to 4.926.

For the reasons set forth in the cover letter to these comments and in the specific comments to §4.916, SCO opposes these proposed regulations.

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COMMITTEES:
BANKING AND FINANCIAL SERVICES

GOVERNMENT REFORM AND OVERSIGHT

JOINT ECONOMIC COMMITTEE

ATTACHMENT 3

Congress of the United States

House of Representatives

Washington, DC 20515–3214

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September 12, 1997

The Honorable John Leshy
Solicitor
U.S. Department of Interior
1849 C Street, NW
Washington, DC 20240

Dear Solicitor Leshy:

As you know, I have been investigating the issue of settlements by the Department of Interior related to royalty disputes. While my investigation has focused on prior DOI settlements, particularly those with Chevron and Exxon, my inquiry is not confined to such and I am also interested in assuring that appropriate procedures are put into place with regard to any future settlements.

I am writing to you for clarification as to DOI's position on the extent of settlement authority extended to it under Sec. 4(a) of the Federal Oil and Gas Royalty Fairness and Simplification Act. That provision provides, in relevant part, that:

> ... the Secretary and the State concerned may take such action as is appropriate to compromise and settle a disputed obligation ...

Congress further provided in Sec. 4(a) that the type of appropriate action that the "Secretary and the State concerned" might take includes "waiving or reducing interest and allowing offsetting of obligations among leases."

Earlier this year, by letter to me dated February 6, 1997, Assistant Secretary Bob Armstrong indicated that this provision of FOGRSFA resolved any doubts that may have previously existed with regard to DOI's settlement authority. I have been told that your office had some role in developing the Assistant Secretary's February 6 response to my inquiries. A recent final rule published by the Minerals Management Service raises new concerns about whether FOGRSFA can have the effect that the Assistant Secretary ascribed to it. "Delegation of Royalty Management Authority to States, "62 Federal Register 43076 at p. 43079 (August 12, 1997). Again, your Office was involved in developing the responses to the public comments submitted on the rule. 62 Federal Register at p. 43076.

Apparently, some States expressed concern that MMS' proposal on delegation was less than faithful to the plain requirements of FOGRSFA Sec. 4(a). MMS proposed that States could participate in MMS settlements on the same terms as they have in the past, which at most has involved consultation. In fact, in his February 6 letter to me, Assistant Secretary Armstrong explicitly noted that State approval of a settlement had not been required in the past. To the States commenting on the MMS' delegation proposal, mere consulation was at odds with FOGRSFA's mandate that "the Secretary and the State concerned may ... compromise and settle a disputed obligation."

To these comments, MMS, with the aid of your Office, responded that FOGRSFA Sec 4(a) "does not expressly grant States authority to settle a dispute or prevent the Secretary from settling a dispute over a State objection ...." 62 Federal Register at p.43079. Of course, if the plain words of Sec. 4(a) do not "expressly grant" the "State concerned" settlement authority, that provision, with its identical treatment of the Secretary, cannot be read as an express grant to the Secretary of settlement authority. Thus, the logical conclusion of the MMS' interpretation of FOGRSFA Sec. 4(a) in the proposed rule is that any settlement authority of the Secretary remains subject to the limitations of the Debt Collection Act. As you know, recent analyses by both the Congressional Research Service and the Department of Justice cast substantial doubt on whether DOI has been conducting its settlement program in compliance with applicable laws and regulations.

Any alternative construction, i.e., one which would square the Assistant Secretary's and MMS' interpretation of FOGRSFA Sec 4(a), is tantamount to saying that DOI can have its cake and eat it too. This appears to be what MMS is suggesting in its proposed rule; that FOGRSFA Sec 4(a) grants express settlement authority to the Secretary, but only grants the "States concerned" a right to be consulted. MMS ignores that Congress knows how to confine State participation to consultation when that was its intent. See FOGRSFA Sec. 3(a), 30 U.S.C. Sec. 1735(d) ("After consultation with State authorities, the Secretary shall . . . .") Rather, to aid its interpretation, MMS searches FOGRSFA for qualifiers to the language "the Secretary and the State concerned may . . . compromise or settle" that are simply absent from the plain language of Sec. 4 (a).

The logic underlying the qualifiers found by MMS is not readily apparent. MMS first notes that under FOGRSFA it retains the "authority to decide appeals." Why this authority would modify State settlement authority is left unexplained and is without any analogues to private settlements of judicial litigation. Certainly, it is within Congress' power to decide that the States, as recipients of mineral revenues, should be permitted to determine, with the Secretary, whether any settlement is in their financial interests. Similarly, MMS' reliance on FOGRSFA Sec 12 and the power to settle an "inchoate property right" ignores the fact that while States may not have a lease or land interest, they do have an "inchoate property right" to the monies received under a lease. In fact, "State concerned", under FOGRSFA, "means, with respect to a lease, a State which receives a portion of royalties or other payments under the mineral leasing laws from such lease." 30 U.S.C. Sec. 1702 (31).

Finally, MMS' suppositions concerning what it "believes" was "Congress' intent" is

without any support in the legislative history. Indeed, the very idea that State involvement could "frustrate" the process is inconsistent with Congress' overall intent to grant the States a "more active role in securing monies owed in a timely manner." If anything, it appears to have been Congress' belief that the States' revenue interests were being frustrated by MMS' process. H.Rep. No. 104-667 at p. 14.

I understand that MMS was under time pressure to promulgate its rule on delegations to States. This may, at least partially, explain the failure to provide a fuller explanation as to DOI's interpretation of FOGRSFA Sec. 4(a). Thus, as DOI's legal representative, I request that you provide me with answers to the following questions:

(1) Is it DOI's position that FOGRSFA Sec. 4(a) grants the Secretary the express authority to settle disputed royalty obligations? If so, is it also DOI's position that Sec 4(a) obviates the necessity for DOI to comply with the limits imposed under the Debt Collection Act?

(2) What authority, administrative or judicial, is DOI relying on for the proposition that the authority to decide appeals limits who has authority to approve a settlement? Is it DOI's position that Congress is without authority to designate who may approve settlements? What in the provisions or legislative history of FOGRSFA suggested to DOI that Congress intended appeals authority to qualify a State's role in the settlement process?

(3) Do the States share in settlement monies attributable to federal leases within their borders? If so, isn't this as valid an "inchoate property right" as "the power to settle a dispute?" What is the basis for DOI's apparent distinction between types of "inchoate property rights" and the relationship of that distinction, as a matter of law, to settlement authority?

As you know, I have expressed concern about both the authority and substance of MMS settlements and particularly the lack of any oversight over MMS' assumption of settlement authority. Unfortunately, nothing in MMS' final rule alleviates any of my concerns since, under it, "MMS will conduct, coordinate and approve any settlement . . ." (Sec. 227.102(d)), without any apparent oversight by the Secretary. Until the interpretation of FOGRSFA Sec. 4(a) appeared, it at the very least seemed likely that States could provide effective oversight. States, as royalty recipients, would have a greater incentive than MMS to assure the greatest return. Since MMS, however, appears to have reserved to itself the power to settle over a State's objection, it is doubtful that the States' role, as viewed by MMS, will provide any real oversight potential. Thus even assuming that there exists some interpretive flexibility in the language of FOGRSFA Sec 4(a) (which personally I do not yet accept), the choice that was made would appear particularly misguided.

It is important that you be aware that through my inquiries, I have gained a great deal of respect for the efforts of MMS, particularly with regard to the strides it has made in putting in place a better system for valuation of crude oil. In the face of considerable opposition and

disinformation, the actions taken by Secretary Babbitt, Assistant Secretary Armstrong and Director Quarterman to move the undervaluation issues forward are commendable.

Unfortunately, at the same time, it is becoming clearer to me that many of the problems MMS continues to face, particularly with regard to settlements, emanate from guidance provided by your Office. From a layperson's perspective, for example, the response to my inquiries about MMS' settlement authority on the Exxon and Chevron settlements appeared to be a facile attempt to look for legal loopholes to the government-wide requirements of the Debt Collection Act. As you know, the procedures to be followed by federal agencies in the collection or settlement of debts owed the United States has been one of my legislative priorities as a member of the House Subcommittee on Government Management, Information and Technology. If the loopholes identified by DOI lawfully exist, then Congress must act to close them and put in alternative procedures that fully safeguard the interests of the United States. If those loopholes are not legally justified, then Congress deserves an explanation as to why the existing government-wide settlement requirements were not followed, what internal guidance is being provided to assure that such errors do not recur, and what, if any, legislative modifications DOI believes should be made. This is as true for the procedures under the Debt Collection Act, as it is for any that may exist under FOGRSFA.

Of course, cooperation, not intransigence, will assist the making of reforms that meet the bona fide needs of any particular federal agency or the federal government as a whole. I look forward to reviewing your response to my inquiries, which I would like to receive as soon as possible and, in any event, within three weeks.

Sincerely,

Carolyn B. Maloney

CAROLYN B. MALONEY
Member of Congress

cc: Hon. Robert Armstrong, Assistant Secretary, Land and Minerals Management
Hon. Stephen Horn, Chairman, Government Management, Information and Technology Subcommitee

§4.927

The appropriate use of the Administrative Disputes Resolution Act depends on more than mere agreement of the parties. See e.g., 5 U.S.C. §572. The MMS proposed rule should be consistent with that Act.

§4.929

(a) The MMS Director should also be entitled to summarily dismiss frivolous and non-meritorious appeals, and such dismissals should be final for the Department. See also, comments to §4.914. The failure of a lessee/designee to state a bona fide claim may not become apparent until after record development.

(b) For the reasons stated above and in the cover letter, SCO opposes any restriction on State or Tribal participation in the Director's decision to rescind or modify an order. The Director should be, at the very least, required to consult with the State or Tribe that issued the audit findings subject to appeal.

(c) States and Tribes should be entitled to supplement the record with evidence that rebuts the MMS Director's modification or rescission, especially if the Director's action is based upon a policy, argument or factual dispute that was not put forward during the record development stage.

(d) The proposed rule should set out with more specificity what the MMS Director must do in terms of stating the reasons for any modification or rescission. At the very least, the Director should be required to state how factual disagreements were resolved and cite to record evidence that supports that conclusion; cite to and explain any policy documents or other authority that supports the modification or rescission; and provide a rationale for any departures from policy or introduction of new policy.

§§ 4.934 to 4.936

For the reasons discussed in the cover letter and in reference to other proposed rules, SCO opposes the limitations on intervention and believes that, at the very least, States and Tribes are entitled to supplement the record after an adverse decision of the MMS Director.

§4.940

This proposal highlights that there are other points in the MMS's proposed process (for example, a lessee/designee's failure to participate in record development) that should serve as grounds for automatic dismissal for failure to prosecute.

§4.956

For the reasons stated in the cover letter, SCO believes that MMS's proposal for "deeming" an adverse result to a State's or Tribe's claim on intervention is unlawful. To be consistent with the format set out by Congress in §115(h)(2) of RFSA, 30 U.S.C. §1724(h)(2), and the proper alignment of the parties in an intervention situation, the MMS Director's modification or rescission, if it impacts less than $10,000, should be decided in MMS's favor. If the State's claim would result in a return higher than $10,000 for both the U.S. and the State, its claim in intervention should be deemed granted. This is also consistent with the oversight role Congress extended to States and Tribes because these entities have a greater incentive to assure that all that is owed is collected.

§4.959

States and Tribes should also be entitled to request consolidation of appeals. If MMS would define the term "appellant" correctly, no modification of this provision would be necessary.

§4.961

This provision is singularly unclear and potentially unfair. A concerned State should be allowed to determine on a case-by-case basis whether it wants to participate in an appeal. Such a decision cannot be made in a vacuum and certainly not without access to the basic documentation required to be served on other entities under proposed §4.962. While in RFSA, Congress mandated that steps be taken to include concerned States (such as the RFSA settlement provision), throughout these regulations and often at key intervals (e.g., a Director decision rescinding an order), MMS proposes to make adequate notice to these States wholly discretionary.

§4.945

A lessee/designee should also be required to explain why the factual disputes cannot be resolved based upon the evidence already in the record. In other words, the lessee/designee must show why a hearing is necessary.

§4.969

As noted above (see comments to §4.914), SCO opposes giving lessee/designee's an opportunity to appeal timeliness issues.

§4.970

SCO notes that the rules cited in this rule reference other rules that presumably would not apply under the circumstances being addressed. Also the rules that are cited conflict.

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SCO recommends that if MMS is going to regulate the format of orders and other audit documents that it explicitly note that this Part does not extend substantive rights to any lessee/designee. This is particularly important since MMS is not going to require lessee/designees to respond to issue letters and produce their arguments and evidence at that point. It is also necessary given the many opportunities that MMS proposes to give lessee/designees to change the record and raise late issues. The government should not be bound by what is set forth in an order when the record development and other procedural stages may raise alternative grounds in support of the order.

ATTACHMENT 2

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March 14, 1997

By Fax (202-208-4891); Original by Mail

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[cc: Hugh Hilliard]
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RE: Proposed Rule, 61 Fed. Reg. 55607 (October 28, 1996); 61 Fed. Reg. 67515 (December 3, 1996)

Dear Ms. Montgomery:

These comments are submitted on behalf of the California State Controller's Office (SCO) to the proposed rule of the Minerals Management Service (MMS) on its administrative appeals process. 61 Fed. Reg. 55607 (October 28, 1996).

I. Preliminary Comments: The RPC Report

In both MMS' original notice and its notice extending the comment period (61 Fed. Reg. 67515 (December 3, 1996)), MMS indicates that it will treat the report of the Royalty Policy Committee (RPC) as comments to its proposed rulemaking on appeals. SCO understands that the RPC is considering and may propose some radical changes to the royalty appeals process. It is SCO's understanding that these changes, which were in the main initially proffered by industry, may include:

- o restricted State participation in appeals:
  - no explicit provision is made for State appeal of orders of the Royalty Valuation Division (RVD) or the Royalty Policy Board (RPB), although this is a right extended under most, if not all, delegation contracts;

- no provision is made for State appeal of MMS' refusal to issue orders or demands [compare S.R. at p. 14 (dealing with rights of lessors)].[1] This is a right that has previously been recognized by MMS, and, indeed is a right that SCO has exercised in the past. The subcommittee report appears to assume that all States will seek the authority to issue demands under the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA), which may not necessarily be the case;

- provisions are included that strategically disadvantage the only appeal rights extended to States, i.e. providing States the ability to appeal from demands that MMS is unwilling to defend administratively, while depriving them of a decision outlining MMS' rationale for choosing not to defend [S.R. at p. 19 (noting protection of rationale under attorney-client privilege)];

- the appeal rights extended to States are illusory. MMS, if it chooses to modify or rescind a demand, is required to request a remand from IBLA [S.R. at pp. 19-20]; at that point there will be no appealable order -- no pending appeal -- before IBLA and thus nothing for a State to defend;

- State participation in many appeals is restricted to amicus, rather than providing States party status [S.R. at p. 20]; and

- no provision is made for States, other than the State that issued the order, to participate as a party to an appeal [S.R. at p. 20].

o confirmation of a lessee's ability to simply ignore issue letters [S.R. at p. 13]. No requirement is proposed that federal lessees participate in an audit by providing that lessees set forth all factual disputes and provide relevant

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[1] Page references to the RPC's appeals subcommittee report are cited as "S.R." SCO supports the idea of the RPC, especially to the extent that it facilitates an open exchange of issues among certain representatives of MMS' various constituent groups. And, SCO has the utmost respect for RPC members, who devote substantial time and resources to the issues. However, ultimately, it remains MMS' obligation to promulgate regulations that best suit its ability to meet its statutory obligations.

documentation at the issue letter stage.

o no practicable means, in terms of either time or process, to test factual material submitted by lessees during the appellate process [S.R. at p. 18].

- provisions are included for complicated post-audit "discovery" mechanisms [S.R. at p. 18]. Discovery is not a process generally used in administrative proceedings. And, as noted, there is no time provided for analysis of materials produced during "discovery."

o an improvident process for making policy determinations, which forces MMS to issue policies based on incomplete facts or no investigatory facts, and precludes the agency from formulating policy through informal adjudications [S.R. at p. 11-12] -- a practice followed by nearly every federal administrative agency, which has been uniformly upheld in the courts, and which, if properly set up, facilitates decisionmaking on a full, fair factual record.

- the process also recognizes the ability of MMS to issue non-appealable policy determinations [S.R. at p. 12]. These would need to be challenged by any State or Tribe in federal court through an Administrative Procedure Act challenge or through FOGRMA §204, to the extent that disagrees with the policy;

- no standards are provided for when an MMS policy decision would be considered appealable or nonappealable; and

- no obligation is placed on the lessee requesting a policy determination to provide all the facts necessary for reaching a decision. Similarly, any request from a State or Tribe for a valuation decision will be unaided by any facts deemed relevant by the lessee. The utility of a decisionmaking exercise based on an incomplete factual basis is suspect.

o a time-constrained settlement process, which will require MMS and lessees to both develop the administrative record and pursue settlement within a four month period [S.R. at pp 17-19].

- Settlement cannot even begin until after the administrative record has been established, which while

on the surface benefits MMS, will in reality leave insufficient time for realistic or well-considered settlements. Lessees are not required to file their statement of reasons before settlement is pursued, but only need to file an abbreviated, "preliminary" statement of issues [S.R. at Appendix C]. The recent report of the Inspector General strongly suggests the inadvisability of settling under such circumstances. See Audit Report on Negotiated Royalty Settlements, No. 96-I-1264. Historically, MMS settlements on even narrow issues have taken several months to conclude, and have involved even longer periods when the appealable order was one for restructured accounting;

- The process does not account for the time involved in getting the necessary approvals for settlement within MMS and by "the State concerned" (which is provided for under the Federal Oil and Gas Royalty Simplification and Fairness Act (RSFA)), let alone the management of the lessee company; and

- The process too heavily relies on the assumption that time constraints will be alleviated through tolling agreements [S.R. at Appendix C]. Tolling agreements, however, must be agreed to by all relevant parties and it cannot be assumed that they will be signed or that signing will not be withheld for strategic advantage.

o no standards governing MMS' ability to modify or rescind an order or its refusal to defend an order [S.R. at pp. 19-20], which:

- adversely affects a State's right to appeal;

- reduces the incentive for lessees to settle given the proposed timing of the MMS decision in this regard;

- adversely affects a State's interest in settlement, since the State is not made aware of MMS' position until after the time for settlement has passed [S.R. at p. 19];

- does not even minimally require MMS to support the very policy determinations that are supposed to be rendered before a demand order is issued. Rather, the proposal apparently would permit MMS to rescind, modify or refuse to defend a demand based on resource concerns or other factors; and

- will occur before MMS has the lessee's full statement of reasons [see S.R. at Appendix C] and thus before MMS can make a considered decision on the advisability of rescission or modification.

o an illusory one-stage appellate process

- a two stage process is actually proposed, where a lessee can both appeal a policy order and then appeal any subsequent demand [see S.R. at p. 12];

the first stage of this process will, at the earliest, begin four years into the seven year statute of limitations. The appellate body, the Interior Board of Land Appeals (IBLA), will have the full 33 months (nearly three years) to decide such appeals. This will leave MMS with only a few months to reformulate and re-issue any demands for payment impacted by any policy decision;

- the first stage process also leaves open the possibility that important policy issues will be reached through decisional default under RSFA's provisions; and

- the first stage process provides an incentive for lessees to file appeals before receiving demand orders.

o a "one-stage" appellate process, with all appeals directly to the IBLA, rather than to the entity with expertise on royalty issues and the existing resources to process numerous appeals.

o an illusory "good cause" standard, which allows IBLA to consider supplementary factual and evidentiary material "if it is material to the determination of the case" [S.R. at p. 21], rather than providing the typical restraints on introduction of newly discovered facts or claims as applied by the courts.

o confusing and self-contradictory provisions, e.g.:

- again how can a State appeal an order that IBLA has remanded at MMS' request [S.R. at pp. 19-20]? At that point there is no outstanding appeal before IBLA;

- the potential for refusal of the Solicitor's Office to not answer a notice of appeal, even where MMS chooses to defend the appeal [S.R. at p. 20]. This option is not explained. As written, it leaves open the possibility

that either MMS or even a State will have to incur the costs of an appellate defense that MMS in fact supports;

- the apparent optional nature of a defense by the Solicitor's Office also leaves open the potential for the very "behind the scenes" influence on policy determinations by that Office that it was the stated intention of the drafters to avoid [S.R. at pp. 3-4], albeit only to the disadvantage of MMS, States and Tribes. It is the obligation of the Solicitor's Office to defend and support MMS orders subject to appeal;

- characterizing issue letters as non-appealable, while at the same time allowing lessees to seek RVD decisions as to those issue letters [S.R. at pp. 11-12]; and

- allowing MMS to modify or rescind demand orders [S.R. at pp. 19-20], but not explaining the long term policy implications, e.g., precedential impact, of exercise of such authority.

o application of the changed appeals process to all mineral leases, not only oil and gas leases, and to Indian leases [S.R. at p. 7].

- opening the door to application of the RSFA default provisions to other federal mineral leases and Indian leases [S.R. at p. 22].

SCO would oppose any change to the administrative appeals process of the nature described above. Without having the benefit of an RPC report, it is difficult to fully respond to these proposals.[2] However, on the surface, it is clear that the proposals:

o will not enhance the prospects of mutually agreeable, let alone well-considered settlements;

o will increase the incentive for industry to appeal both early and often;

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[2] The RPC's appeals subcommittee report contains some general discussion about the problems with the current MMS appeals process, but does not provide a section by section analysis of how its proposals will resolve those problems or any rationale for the provisions it does propose.

o will demand a substantial increase in resources for MMS's Office of Enforcement, the Solicitor's Office and the Office of Hearings and Appeals without significant, if any, resource savings for MMS;

o will not enhance the agency's ability to establish rationally based formal positions on complicated, novel royalty issues;

o will not result in any real time savings, thus opening the door to decisions by default under RSFA; and

o will not adequately protect the States' interests in royalty cases.

It is also clear that any acceptance by MMS of the RPC proposals would be a substantial change from the proposals contained in its currently published rulemaking and not a "logical outgrowth" of the rulemaking proceeding. See AFL-CIO v. Donovan, 757 F.2d 330, 338 (D.C. Cir. 1985). Acceptance of those proposals without further notice and comment publication would be procedurally invalid. Id. See also Animal Legal Defense Fund v. Glickman, 943 F. Supp. 44 (D.D.C. 1996)(receipt of comments supporting substantial changes to proposed rule does not meet agency APA notice requirements). Thus, should MMS be inclined to accept any of the proposals of the RPC, SCO specifically requests that it re-publish any such rule for further notice and comment and make the full record of the RPC's consideration of the appeals issue publicly available.

II. The MMS Proposed Rule

The rule proposed by MMS, however, contains some laudatory improvements to the current MMS appeals process, such as setting deadlines for filing of statements of reasons, coupling extensions with tolling agreements and filing fees. Each of these proposals is aimed at streamlining the current appeals process, which SCO supports. SCO also applauds MMS' attempt to respond quickly to the new procedures and deadlines imposed by RSFA. It is also noteworthy that MMS' proposals follow its own successful efforts to implement internal procedures (e.g., the differentiation between routine and non-routine cases) for reducing the backlog of existing appeals cases. MMS has demonstrated that it has both the resources and commitment to streamline action on appeals.

Nonetheless, as described more fully below, SCO also has some serious reservations about MMS' some of MMS' proposals.

A. State Participation

SCO's first objection to the MMS proposal is that it fails to provide for State participation in the appeals process.

First, the regulations should explicitly provide that every State office that operates under a delegation or cooperative agreement is automatically deemed a party to any appeal involving an audit conducted by that State office. By defining these State offices as parties, they would be entitled to participate in all briefings, hearings, settlement conferences, alternative dispute resolution processes and, in addition, could appeal from decisions rendered by MMS or, if relevant, IBLA. Moreover, the regulations should allow States and other royalty beneficiaries to intervene as of right in appeals involving issues arising from leases in other jurisdictions where decisions on such issues will impact their audit programs and royalty revenues and in appeals from RVD decisions. Both of these mechanisms are consistent with Congress' intent in RSFA to increase the States' role in the royalty management program.

SCO thus recommends that a new section be added to provide State's with party status and to permit State intervention in royalty appeals. In addition, proposed §290.5 should be amended to reference the States' ability to appeal to IBLA, if IBLA second stage appeals are to be retained (see discussion below).

Second, the proposed regulations do not adequately address the process to be followed when the order or decision is rendered by a State. RSFA provides that States may assume the responsibility for issuing certain appealable orders such as demands and orders to perform. However, throughout the proposed rule MMS refers to the "MMS office that issued the order or decision." In this regard, SCO recommends that: (1) MMS establish a single internal office for the filing of administrative appeals, and (2) MMS require appellants to file all appeals documents, including requests for extension of time, with both the MMS internal office and the MMS or State office that issued the order or decision, or the State that conducted the audit where such State has not assumed the responsibility over issuance of orders. This recommendation would resolve the problem of filing appeals from State issued orders and would provide timely notice of appeals to States, facilitating both quicker preparation of field reports and State participation in appeals.

Third, proposed §290.5 should be modified to permit States to both request a hearing on any appeal and to participate in any

hearing allowed a lessee.

Fourth, the regulations should specifically recognize, through appropriate amendment of proposed §290.2, that States may appeal from any MMS order or decision that adversely affects their interests. This right should include appeals from MMS's refusal to issue a demand. As MMS is aware, most, if not all, State delegation contracts extend States the right to appeal. States should be treated like Indian Tribes for purposes of the MMS appeals regulations. See e.g., proposed §290.4(a) (exempting Tribes from payment of filing fees).

B. Coordinated Reform

SCO also maintains concerns about whether MMS's proposal is workable under the new RSFA regime or whether it will simply result in numerous "decisions by default." While, as noted, MMS has proposed a number of truly laudatory improvements to the appeals process, at most, these proposals tinker around the edges of one part of the extant two stage administrative appeals process.

Historically, the Department has not processed royalty appeals promptly, and indeed, rarely has a single appeal been decided within 33 months, the time deadline established under RSFA. Unless there is a more substantial restructuring of the appeals process, involving a coordinated re-thinking by the Royalty Management Program, the MMS Appellate Division and, if relevant, the Office of Hearings and Appeals, SCO fears that numerous decisions will be rendered by default (see e.g., proposed §§ 290.6, 290.9(b)) rather than through a reasoned explanation entitled to deference by the reviewing entity, be it IBLA or a federal court.

In addition to MMS' own streamlining proposals, SCO recommends three additional measures, the adoption of which would substantially assist MMS in meeting the RSFA deadlines.

1. Lessees Should Be Required To Produce All Relevant Documents At the Issue Letter Stage

First, SCO recommends that MMS require a federal lessee to, at the very least, identify all factual disputes it might have within 30 days of its receipt of an audit issue letter. The lessee should be required to provide all documentation supporting its view of the facts. Should the lessee fail to respond to the issue letter, it should be barred from relying on any facts or documents not provided during audit in support of its appeal. Any departure from such a rule should be confined to situations where a lessee can

clearly and convincingly establish that it did not have knowledge or access to the factual material before the demand was issued. If the relevant material is in the lessee's possession or through reasonable diligence could have been obtained by the lessee, it should be required to produce it during audit.

The merits of such a rule are obvious. First, it would enhance the audit process by assuring that MMS auditors are provided with full documentation. Second, it would reduce the number of appeals, by allowing auditors to modify their audit findings where the facts so warrant. Third, it would reduce the number of issues to be resolved on appeal and avoid the necessity for others within MMS to make factual determinations and analyses, which are better evaluated in the first instance by auditors. Fourth, it would save resources and time by facilitating quicker preparation of field reports, by avoiding the constant diversion of audit resources to assisting with appeals and by enabling quicker consideration by the MMS Appellate Division.

SCO notes that, as a rule, federal lessees simply ignore issue letters. And, it has been SCO's experience that this has, in fact, caused delays in the preparation of field reports and appeals decisions. Indeed, there have been several occasions where a lessee's late notice to MMS of relevant facts has resulted in SCO retracting a demand or modifying a demand. Unfortunately, this occurred after a waste of substantial resources by SCO, the MMS Appellate Division and/or MMS' Office of Enforcement. There is simply no sound reason why industry should not also have to reassess its own resource allocation in light of the deadlines set under RSFA. There is no excuse, other than perceived strategic advantage, for federal lessees to simply refuse to participate in the audit process.

In this regard, SCO suggests that MMS modify proposed §290.3 to reflect that "good cause" means proof that the lessee did not have knowledge of or access to the information required for its filings and could not with reasonable diligence obtained such information. Such a standard should apply to both extensions of time and to requests of a lessee to file supplemental documents. SCO notes that this is the standard commonly used in judicial proceedings, especially under the new so-called "rocket docket" civil procedures.

SCO also understands that certain industry representatives complain about lack of access to agency records for appeals purposes. SCO would first note that such access is not a necessary requirement for informal adjudications governed under the

Administrative Procedures Act, 5 U.S.C. §555. See e.g., PBGC v. LTV Corp., 496 U.S. 633, 655 (1990). To SCO's knowledge, nothing in the applicable statutes requires MMS to conduct "on the record" formal adjudications in royalty cases.

To the extent that MMS chooses to introduce more formality into its appeals process, SCO would not object to providing lessees the underlying documents relied upon in formulating an order or demand. However, this right should not permit the lessee to access all agency data, but only that actually used to support the demand. Nor should a federal lessee be entitled to access work product or other materials subject to privilege or other standard nondisclosure principles.

Isolated problems might arise where a demand has been supported in part by documents submitted by a lessee not affiliated with the appealing lessee. In such situations, the better approach would be to provide the appealing lessee limited use access under a consent order, rather than providing for broad discovery. SCO notes that even under judicial discovery procedures, consent or protective orders are the appropriate means for providing access to such data for purposes of litigation. Thus, providing for discovery alone would not resolve the problem.

2. A One Stage Appeal To MMS Should Be Provided

Second, SCO recommends that the Department dispense with the second stage appeal to IBLA. Nothing under federal law mandates that IBLA hear royalty appeals. MMS is in a better position, in terms of both resources and expertise, to decide the issues raised in appeals of demand letters or other MMS orders. And, with all due respect to IBLA, it has not processed royalty cases quickly and, possibly as a result, has not developed the expertise necessary to deal with difficult issues involving the interface between minerals marketing and policy that are raised in royalty appeals. Indeed, currently IBLA does not process royalty cases within 33 months and this is under circumstances in which it receives only a small fraction, less than 10 per cent, of the total MMS appeals docket. IBLA's ability to process all royalty cases is, therefore, subject to serious question. The risk of royalty losses, as a result of the RSFA deadlines and default provisions, strongly counsels against overwhelming a resource-limited IBLA with royalty appeals. And, needless to say, any effort by IBLA to meet the RSFA deadlines will adversely impact its ability to timely decide other important public lands cases.

SCO strongly believes that it is MMS' responsibility to

develop and apply the policies governing the royalty management program. As noted, the Service has already demonstrated that it has both the resources and commitment to expedite its appeals process.

SCO understands that certain industry representatives on the RPC's appeals subcommittee objected to an MMS appeals process (both as a single stage or part of a two stage process) because of the "secret" involvement of the Solicitor's Office. SCO is not without some sympathy for these concerns. There have been situations that have suggested that representatives of the Solicitor's Office have been more inclined to dictate policy rather than to support decisions or render advice on the overall boundaries of MMS' authority.

To the extent that there is a problem, however, it can be resolved by limiting the involvement of the Solicitor's Office in the MMS appeals process. Options include: (a) expanding field reports to include legal analyses; (b) expanding the legal resources of MMS's own appellate division; (c) ending the practice of routing all draft appeals decisions through the Solicitor's Office; (d) limiting the involvement of the Solicitor's Office to "on request" of the Director; and (e) permitting the Director to call for a second round of abbreviated briefing by the lessee or the involved State or Tribe if the Solicitor raises a new legal basis in support of or in objection to an issue on appeal.

In short, the concern about "secret" involvement of the Solicitor's Office is not such an insurmountable problem or concern that it would justify throwing out the baby with the bathwater. As MMS has represented to the States through other forums, there are fewer and fewer appeals that raise novel issues of policy and thus the need for active involvement of the Solicitor's Office is also less. Introducing more certainty and clarity in MMS substantive regulations, as may be achieved by other outstanding proposed rules, should also reduce the need for regular involvement of the Solicitor's Office in the MMS appeals process. Indeed, if anything, SCO's experience has been that, in general, involvement of the Solicitor's Office has been a substantial delaying factor in the processing of appeals; often simply because that Office does not have the resources to give attention to appeals on a timely basis.

SCO also understands that concerns have been expressed by industry about the "ex parte" involvement of MMS' investigatory staff in the appeals process. Referring to such contacts as "ex parte" is a misnomer. So long as there is a separation of

functions between the investigator/prosecutor and the decisionmaker, there is no legal basis for objection to the participation of investigatory staff. See e.g., Withrow v. Larkin, 421 U.S. 35 (1975). Just as the federal lessee, investigatory staff has the right to present "its case" to the decisionmaker; investigatory staff is as much a "party" to the appeal as the federal lessee.

To SCO's knowledge, no federal lessee has ever raised objection on appeal to the MMS appeals process on the basis of the participation of investigatory staff and it is highly unlikely that any such objection could be sustained. See e.g., Withrow v. Larkin, supra; Gibson v. FTC, 682 F.2d 554 (5th Cir. 1982), cert. denied, 460 U.S. 1068 (1983). It is also open to question whether the separation of functions requirement for formal adjudications under the Administrative Procedure Act, 5 U.S.C. §554, applies to informal proceedings under 5 U.S.C. §555, which governs MMS royalty appeals cases.

Nonetheless, the MMS process does provide for a separation of functions between the investigator or prosecutor and the decisionmaker. Moreover, SCO notes that if all the relevant facts were presented to investigatory staff by the lessees during audit, the need for their participation in order to respond to issues raised on appeal by lessees would be reduced. Thus, SCO's first recommendation in itself would resolve any supposed "appearance of bias" problem. If more is needed, investigatory staff could be allowed to request a hearing before the Director on any appeal and/or participate in any hearing requested by a lessee.

In the alternative, SCO recommends a more limited two stage appeals process. A federal lessee could be extended the opportunity to seek discretionary review of an MMS decision by either IBLA or the Assistant Secretary for Land and Minerals Management. This review would be analogous to certiorari review to the Supreme Court, should be available only where a federal lessee agrees to and files a tolling agreement and should be limited to a showing by the lessee that the MMS decision is in actual conflict, as a matter of law, with another final determination of MMS.

Acceptance of either SCO's recommendation to dispense with IBLA appeals or its proposed alternative would allow MMS, if it so chooses, to modify its proposal for a 16 month MMS review process. However, SCO believes that under its recommended approach appeals could easily be decided within a time frame substantially under the

RSFA mandated 33 months.[3]

3. Separate Appeals Procedures Should Be Established For MMS Policy Determinations

Third, SCO recommends that MMS establish a separate approach for the issuance and review of policy determinations made by RVD or any other relevant body.

Generally, SCO believes that informal adjudications provide the optimum avenue for the resolution of difficult policy issues. As noted, most federal agencies employ such a process where initial decisions are based on investigations, like MMS audits. See e.g., Stein, Mitchell, Mezines, Administrative Law ¶33.01[1] (1997) (noting that most federal agency adjudications are informal). And, the authority and benefits of such an approach to policy formulation have been recognized by the courts. See e.g., PBGC v. LTV Corp., 496 U.S. 633 (1990); SEC v. Chenery Corp., 332 U.S. 194 (1947); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

While informal adjudications may not always lend themselves to broad based policy decisions, they do allow for policies to be developed in light of the marketing and other facts set forth by the parties. This leads to better informed decisions, which provide real guidance to both auditors and lessees. In so-called "non-routine" cases, it also provides a better vehicle for addressing unique circumstances discovered through audit or brought forward by a lessee. In short, gray areas in regulations are best decided under situations where MMS has a full grasp of the relevant facts, rather than in a factual vacuum or on the basis of one-sided factual presentations.

It has unfortunately been SCO's observation that MMS has not always been successful in issuing broader based informal policy statements or interpretive rules, or in issuing advisory opinions to lessees or auditors in advance of audit investigation or the issuance of demands. MMS' efforts to issue broad based policy

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[3] The MMS proposal, which was first published in October 1996, does not address the RSFA mandated settlement conference. SCO believes that such a conference should occur within 60 days of the filing by the lessee of its statement of reasons under proposed §290.3. This would provide MMS with ample time to put together an administrative record and evaluate the lessee's submissions. If the parties agree to continue settlement discussions, they should be required to enter into a tolling agreement.

guidance have been a substantial source of delay to the audit program; delay that can no longer be tolerated since the enactment of RSFA.[4] And, MMS' efforts have often created more confusion, than they have resolved problems. This is usually because the decisions are issued without a strong background of facts about what is actually transpiring in the marketplace. This decreases the actual utility of such policy determinations. Moreover, when the true facts are revealed during audit, the result has been considerable litigation risk caused by premature policy formulation and/or concomitant loss in royalties. More recently, possibly in recognition of the risks of formulating policy in a factual vacuum, MMS' policy guidance has been so broad or qualified as to not provide true assistance to either auditors or lessees.

Similarly, MMS' advisory opinions, such as on transportation allowances, are as a rule based on a one-sided version of the relevant facts. For this reason, they are, very wisely, issued subject to audit.

SCO recognizes that situations may arise where federal lessees, States or Tribes may request MMS to render broader advisory guidance or opinions. In such situations, however, SCO recommends that RVD or any other relevant body set forth specifically the facts upon which its guidance is based and note that its non-binding opinion could change depending on deviations from its factual predicate. RVD or any other relevant body should be required to respond to such a request within 30 to 60 days. Review of all such decisions should be permitted, but could take the following alternative forms.

The decision could be deemed nonappealable. A lessee, however, could appeal the decision when and if it is used as a basis for a demand for payment. Similarly, a State or Tribe could appeal the decision when and if it is used as a basis for the non issuance of a demand by MMS.

Alternatively, the decision could be made immediately appealable. If this course was chosen, however, SCO would recommend that any such appeal be placed on a fast track appeals process of no longer than 12 months. If the Director does not

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[4] Some of MMS's better attempts to formulate broad based policy (e.g., coal bed methane issue) have only come after exhaustive factual investigations. Unfortunately, RSFA deadlines will substantially disable MMS from undertaking such investigations.

issue a decision within 12 months, RVD's order would be deemed upheld. This would guard against the pendency of such appeals adversely impacting the audit process.

C. Non-Federal Oil and Gas Royalty Appeals

SCO opposes expanding the decisional deadlines of the proposed rules to appeals involving royalty related issues stemming from Indian leases or leases for minerals other than oil and gas.

Historically, the Department has processed royalty appeals promptly. RSFA places new and stringent time deadlines on the appeals process with regard only to federal oil and gas leases. Whether the Department will be able to meet these deadlines is uncertain. SCO believes the wiser course for MMS is to test whether any change to its appeals process is workable before applying it generally. SCO fears that MMS will not be able to meet the regulatory deadlines for oil and gas issues if it must also process all other lease issues in a shortened time period. While streamlining the entire MMS appeals process is a worthy goal, the agency should not bite off more than it can chew.

Respectfully submitted,

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